IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

FILED
U. S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS
FEB 27 1970
JAMES R. COONEY, CLERK
BY DEPUTY Myra Borton

SAMUEL R. POTTER,
PLAINTIFF

VS.

FIBREBOARD PAPER
PRODUCTS CORPORATION,
ET AL, DEFENDANTS

CIVIL ACTION NO. 6329

FIRST AMENDED ORIGINAL ANSWER OF DEFENDANT OWENS-CORNING FIBERGLAS CORPORATION TO PLAINTIFF'S SECOND AMENDED ORIGINAL COMPLAINT

Comes now Owens-Corning Fiberglas Corporation, one of the defendants in the above styled and numbered action, and answering Plaintiff's Second Amended Original Complaint on file herein respectfully says:

1.

Answering Paragraph 1, this defendant says that it does not know whether this Court has jurisdiction of this controversy inasmuch as it does not have knowledge as to the citizenship of parties defendant other than this defendant.

2.

Defendant admits the facts stated in Paragraphs 2 and 3 of said complaint.

3.

Answering Paragraph 4, this defendant admits that it manufactured and sold insulation materials but denies that any of them caused any injury to the plaintiff.

4.

This defendant denies the facts stated in Paragraphs 5, 6, 7, 8, 8-a, 9, 10, 11, 12, 13, 14 and 15 of said complaint.

5.

This defendant denies that plaintiff is entitled to the relief prayed for in the concluding paragraph of said complaint.

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6.

For further affirmative defense herein, this defendant says that the products which this defendant manufactured and sold were at all times reasonably fit and suitable for the purposes for which manufactured and sold, and this defendant denies that the same were in anywise defective for the use for which they were manufactured.

7.

For further affirmative defense herein, this defendant denies that the plaintiff sustained any injury as the result of contact with or use of any product manufactured by this defendant, and denies that any product or products which it manufactured and sold in anywise caused or brought about any injury or illness to the plaintiff and this defendant further says that the physical condition of which plaintiff complains herein was in nowise caused or brought about by any product manufactured and sold by this defendant, and that such condition was due solely to disease and other causes.

8.

For further affirmative defense herein, this defendant avers that if the plaintiff did sustain any injury as the result of the use of any product manufactured by this defendant, which is not admitted but expressly denied, then such injury was sustained as a result of the occupation of the plaintiff as an insulator or worker in the insulation field for a number of years, that at all times he knew he was working in dust laden air which contained asbestos dust and other dust particles created by his own work and the work of other insulators, and by the failure of his employers or the owners of the premises on which he was working to provide facilities and means for the elimination of dust laden air, and therefore any such injury as he may have sustained was some occupational disease resulting from his

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continued occupation over a long period of time as an insulator, and not as a result of any isolated incident or contact with any product manufactured by this defendant, and this defendant is not legally liable therefor; that further, this defendant denies that the plaintiff worked with products manufactured by this defendant.

9.

For further affirmative defense herein, this defendant specially denies that the plaintiff sustained any injuries as a result of contact with or use of any product manufactured by this defendant, and specially denies any fault or breach of warranty on the part of this defendant and specially denies that it or any of its agents, servants, or employees were guilty of any negligence proximately causing or contributing to cause the plaintiff's alleged injuries and damages, if any; but on the contrary, this defendant avers that the plaintiff himself was guilty of various acts, wrongs and omissions, each and all amounting to negligence, which, acting together or separately, were the sole proximate cause of his alleged injuries and damages, if any, or in the alternative, were a proximate cause thereof.

10.

For further affirmative defense and in the alternative, this defendant alleges that the plaintiff's alleged injuries and damages, if any, were caused solely, or, in the alternative, were proximately caused by acts, wrongs, omissions and negligence of third parties or a third party for whose act or actions this defendant is in nowise liable or responsible; or in the alternative, the physical condition of which plaintiff complains was due solely to causes other than any negligence, fault or breach of warranty, none of which are admitted but denied, on the part of this defendant.

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11.

For further affirmative defense, and in the alternative, this defendant would show unto the Court that all situations and conditions, and the danger, if any, arising from the continued use of such insulating material or materials, were open and obvious to the plaintiff and if any dangers existed as claimed by him, which are not admitted but denied, same, if existing, were apparent and were easily discernible by him and the plaintiff knew as much about same as did the defendant, and such matters were well known to him or should have been known to him; but nevertheless, he continued to work as an insulator and continued to subject himself to air which was laden with insulation material, and such conditions, if existing, were not such that this defendant would be legally liable to the plaintiff therefor.

12.

For further affirmative defense, and in the alternative, this defendant avers that the plaintiff at all times knew of the dangers involved with insulation materials containing asbestos and in working in dust laden air where insulation materials were in use, and he had actual notice and knowledge thereof, or in the alternative should have known of same, and he knew and appreciated the nature or extent of such dangers, if any, and he continued to use and to work with such materials and under such conditions with such knowledge, and therefore this defendant owed him no duty to warn him of any potential dangers involved, if any, and defendant pleads the doctrine of volenti non fit injuria herein.

13.

For further affirmative defense herein, this defendant says that any cause of action which the plaintiff has or may ever have had against this defendant accrued more

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than two years prior to the commencement of this suit against this defendant and is barred by the Texas two year statute of limitations, Article 5526, Vernon's Civil Statutes of Texas, and defendant pleads same in bar to this suit.

14.

For further affirmative defense herein, this defendant says that any cause of action which the plaintiff has or may ever have had against this defendant accrued more than four years prior to the commencement of this suit against this defendant and is barred by the Texas four year statute of limitations, Article 5529, Vernon's Civil Statutes of Texas, and defendant pleads same in bar to this suit.

15.

For further affirmative defense, and in the alternative, this defendant would show that there is and was no legal liability on the part of this defendant, because of the fact that the alleged happenings in question were brought about or caused by transitory conditions arising in the course of the work the plaintiff was doing, and ordinarily incident thereto, the plaintiff and his employers using their own manner, method and means of doing the work, and defendant owed no duty with respect thereto.

16.

For further affirmative defense herein, and in the alternative, this defendant says that the plaintiff's alleged injuries and damages, if any, were the result of an unavoidable accident.

17.

For further grounds of relief, this defendant says that if any judgment is entered herein jointly and severally against it, and other defendants, then and in such event this defendant is entitled to contribution against such other defendants according to the provisions of Article 2212 of Vernon's Civil Statutes of Texas.

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WHEREFORE, this defendant prays judgment of the Court that plaintiff take nothing against it by his said complaint and that it go hence and recover its costs in this behalf expended, and in the alternative that it have judgment for contribution as set forth above.

Respectfully submitted,

KING, SHARFSTEIN & RIENSTRA

BY: _____

707 Beaumont Savings Building
Beaumont, Texas
Attorneys for Owens-Corning
Fiberglas Corporation

A true copy of the above and foregoing answer was on this the 26th day of February, 1970, served upon counsel for the plaintiff by depositing the same in the United States Mail, postage prepaid, addressed to Honorable Ward Stephenson, Attorney at Law, Stephenson Building, Orange, Texas, and also a true copy served on all other interested counsel of record.

_____

Attorney for Defendant
Owens-Corning Fiberglas
Corporation

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